In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1481

ROBERT V. STOVER, *et al.*,
Petitioners,

vs.

CHICANO POLICE OFFICERS' ASSOCIATION, *et al.*,
Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari

VILMA S. MARTINEZ
JOEL G. CONTRERAS
RAY M. VARGAS
Mexican American Legal Defense and Educational Fund
145 Ninth Street
San Francisco, California 94103
Telephone: (415) 864-6000

Counsel for Respondents.

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No. 75-1481

ROBERT V. STOVER, Chief of Police, Albuquerque Police Department, ROY BACA, ROBERT T. POOLE, NANCY KOCH, LOUIS SAAVEDRA, RICHARD VAUGHN, City Commissioners for the City of Albuquerque, all of the above individually and in their official capacity, and HERB SMITH, City Manager, individually and in his official capacity,

Petitioners,

vs.

CHICANO POLICE OFFICERS' ASSOCIATION and SEGILFEREDO SANCHEZ, VINCE VILLANUEVA, DANIEL GARCIA, ARCHIE BORUNDA, ELOY SANCHEZ, ROBERT CHAVEZ, FLAVIO ROMERO, ERNEST OLAGUE, DAVID GARCIA, MAURICE MOYA, FRANK CHAVEZ and ROY BESERRA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 526 F.2d 431. The District Court made written findings and conclusions, although no written opinion was rendered (R., Vol. I, 285).

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered on November 20, 1975. Petitioners filed, in the Court of Appeals, a Petition for Rehearing and Suggestion for Rehearing en banc, which were denied on January 14, 1976. This petition for writ of certiorari was filed April 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that an unincorporated association (composed primarily of incumbent Chicano police officers) and individual Chicano police officers have standing to challenge the hiring procedures of a municipal police department under 42 U.S.C. §§ 1981, 1983, and 1985 and other federal statutes.

2. Whether the Court of Appeals correctly held that results of promotional examinations administered in prior years are relevant to both the individual and Association claims that the promotional examinations have a discriminatory impact in violation of 42 U.S.C. §§ 1981, 1983, and 1985.

3. Whether the Court of Appeals correctly held that the results of prior examinations under the circumstances of this case were improperly rejected as irrelevant.

4. Whether the Court of Appeals correctly held that the size of the test sample group in this case was not too small to be evaluated as significant.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, Article III and Amendment XIV; and 42 U.S.C. § 1981, 1983, and 1985 are set forth in the Petition for Certiorari, p. 3.

STATEMENT

This suit was filed by twelve individual Chicano police officers and the Chicano Police Officers Association (Association) against named officials of the City of Albuquerque, New Mexico alleging certain employment practices and procedures of the Albuquerque Police Department (Department) as constituting unlawful employment discrimination in violation of 42 U.S.C. §§ 1981, 1983 and 1985 and other federal statutes (R., Vol. I, 9). Respondents were plaintiffs in the case below.

The complaint alleged both the hiring and promotion procedures of the Department were racially discriminatory against Spanish-speaking and surnamed Americans. The complaint stated the Department hiring and promotion procedures, including tests and other job criteria used by the Department, are not substantially related to job performance and have the effect of excluding a disproportionate number of Chicanos from employment and promotions in the Department. The complaint sought declaratory and injunctive relief to bar future discrimination and correct the continuing effects of past discrimination.

The evidence at trial showed that the Chicano population of Bernalillo County, where Albuquerque is located is about 39.2% of the total population (Exhibits 26, 27; R. 471, 472). The Department had 402 employees, of whom just 86 (21.3%) were Chicano as of August 1973 (Tr. 643). The distribution of the Chicano police officers throughout the Department was highly stratified by rank. None of the seven police captains were Chicano; only one of the 22 lieutenants was Chicano (4.5%); 18.3% of the sergeants were Chicano; and 31% of the police patrol officers were Chicano. (Exh. 13, R. 398, Tr. 641). This distribution reflected the concentration of Chicanos in the lowest ranks of the Department.

The entry level and promotional opportunities for police officers are determined by written examinations. At all times since 1965 promotion to the ranks of sergeant and lieutenant has been conditioned upon the successful completion of a written exam (Tr. 175, 179, 182-183, 268.) A satisfactory score on an entry level examination is a requirement for acceptance into the police academy. A regulation adopted in 1971 extended the written examination requirement to the rank of captain and established a requirement of six college units

successfully completed during each calendar year in which the applicant takes a promotional examination up to a baccalaureate degree.

At trial Respondents offered and the trial court excluded evidence of prior written examinations for promotions which Petitioners objected to as irrelevant and were excluded at the trial (R. 288-89, 313). For the sergeants examinations in the years 1966, 1969, and 1970, 258 Anglos were examined and 118 or 46% passed, compared to 79 Spanish surnamed persons examined of whom only 11 or 14% passed. For the lieutenants examination during the years 1966, 1968 and 1970, 54 Anglos and 13 Spanish surnamed Americans were examined, of whom 33 (61%) of the Anglos passed compared to seven (53%) of the Spanish surnamed Americans who passed. (Pl. Exs. 8, 9, 10, 11, 12; Tr. 53, 55, 57, 59, 60; R. 294-295.) The Respondents offered the results of the entry level examination for the years 1971 through 1973. (Pl. Ex. 2; Tr. 33, 34.) These results showed that of 1,300 examinees, 43% of the Spanish surnamed applicants passed (119 of 273), while 78% of the Anglo applicants passed (811 of 1,027). The District Court did not consider these results in making its findings.

The most recent promotional examinations were conducted by the Department on June 2, 1973. Six of the named Respondents took the sergeants examination and two took the lieutenants examination; all of whom failed to score high enough to be considered for promotion. One of the Respondents examined in June 1973 had also been previously examined for promotion to lieutenant on three attempts (R., Vol. VI, 288).

Three of the Respondents were not eligible to take the promotional examination because of the educational requirements. The results of the June 2, 1973 examinations showed a 19% passing rate for Anglos and 11.5% for Spanish-surnamed examinees on the sergeants examination; the lieutenants examination results were a 14% passing rate for both Anglos and Spanish-surnamed examinees (R., Vol. VI, 63, 64, Pl. Ex. 14).

The Petitioners' expert on testing testified that the results of the 1973 sergeant and lieutenant examinations constituted a "statistically significant" disparity for Spanish-surnamed examinees as compared to Anglos (Tr. 645-46). The Petitioners' test expert testified that the statistics of the June 2, 1973 promotional examinations did not show a significant adverse effect

on Chicanos compared to their numbers in the Department (R., Vol. X, 770-771, 772-787).

On the issue of standing, Respondents testified both as individuals and as members of the Association concerning the direct, personal injury inflicted upon them by discrimination at the entrance level (Tr. 85, 86, 241-43, 249, 375, 276; Affidavit of Frank Chavez, R. 201). The testimony reflects the desire and purpose of the Petitioners to form an Association to correct discrimination at the entrance level and thereby increase the effectiveness of Chicano officers in improving conditions throughout the Department.

After presentation of the Respondents' evidence, and that of two of Petitioners' witnesses heard out of turn, the trial court granted the Petitioners' motion to dismiss under Rule 41, F.R.C.P., on the ground that Respondents had shown no right to relief. The District Court entered a judgment of dismissal in the case holding the Respondents had shown no right to relief (R., Vol. I, 285).

The Court of Appeals held that the District Court's improper findings resulted from its having committed three principal errors of law in: (1)

denying the individual Respondents and the Association standing to challenge the Department's entry level requirements; (2) excluding evidence offered by Respondents to establish a prima facie case against the Department's promotional examinations; and (3) concluding that Petitioners had failed to show a statistically significant adverse impact on Chicanos on the most recent promotional examination. The findings, conclusions and judgment of the District Court were vacated, and the case was remanded to the District Court for further proceedings.

REASONS FOR DENYING THIS WRIT

I. THE COURT OF APPEALS USED THE CORRECT LEGAL STANDARD IN HOLDING THAT RESPONDENTS HAVE STANDING TO CHALLENGE THE ENTRY LEVEL REQUIREMENTS OF THE PETITIONERS.

A. The Court of Appeals Correctly Determined That the Respondents Had Shown a Direct Injury and Interest to Support Their Standing to Sue. That Determination Does Not Conflict With Any Decision of This Court or of Any Circuit Court.

Standing to invoke federal jurisdiction involves the "Case or Controversy" limitation imposed by Article III, Section Two of the United States Constitution and the self-restraint limitations relating to judicial self-governance. Barrows v. Jackson 346 U.S. 249, 255-256 (1953); Warth v. Seldin 95 S. Ct. 2197, 2205 (1975).

Petitioners assert that Respondents lack standing because they have made an insufficient showing of injury in fact and because they seek to assert the constitutional rights of third parties (Jus tertii) which, as a general proposition is prohibited. Tileston v. Ullman 318 U.S. 44 (1943). Petitioners rely almost exclusively on Warth v. Seldin, supra, to

substantiate their claim that Respondents' standing to sue is precluded on the two foregoing grounds.

The court held in Warth there had been no showing of "substantial probability" as neither past construction efforts nor concrete future plans were likely to satisfy plaintiffs housing needs (95 S. Ct. at 2209) in a challenge to a zoning ordinance. The court held that Plaintiffs' inability to reside in Pennfield, for one group of Plaintiffs, was a consequence of the economics of the area housing market and not its zoning practices, i.e., there had been no showing of injury to them by Pennfield's acts. This class of Plaintiffs had no standing because Defendants had not caused injury to them. (See 95 S. Ct. at 2209.) There was no casual link demonstrated between Plaintiffs' exclusion and Pennfield's zoning practices.

A second group of claimants were Rochester taxpayers alleging that Pennfield's policies forced Rochester to grant a tax abatement which in turn placed a greater tax burden on other property owners, like themselves, to pay for city services. The court ruled that this group had no standing because the higher taxes paid

by Rochester residents was not the result of inexorable economic consequences but resulted from the decision made by Rochester authorities to subsidize low income housing (95 S. Ct. at 2210). The court added that these plaintiffs could not assert the legal rights of others in order to obtain relief from injury to themselves (95 S. Ct. at 2210-11.)

Another group of plaintiffs in Warth was composed of Pennfield residents alleging the denial of the benefits of living in an integrated community, relying on Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). The Warth court distinguished Trafficante on the ground that it involved a statute establishing standing even where the plaintiff has suffered no judicially cognizable injury. This class of plaintiffs had made no such claim under such statute.

A fourth group of plaintiffs was composed of housing contractors associations asking damages and injunctive relief. Relative to the latter claim for relief the court stated that no standing was evident as there had been no showing that a specific project had been

prospective relief sought by the home builders could have standing as the representative of its members only if there were alleged facts sufficient to make out a case or controversy had the members themselves brought suit. The failure to show the existence of any injury to its members of sufficient immediacy and ripeness precluded establishing standing to warrant judicial intervention. Warth, 45 L. Ed. 2d 343 at 365.

Juxtaposing the foregoing to the facts in the case at bar, it is apparent that the Chicano Police Officers' Association and the individual named Plaintiffs have suffered a cognizable injury sufficient to accord them standing to sue. The record discloses that at trial there were approximately 402 commissioned officers, 86 of whom were Chicanos. (R. Vol. VI, 82.) The Chicano population of Bernalillo County at the time of trial was approximately 39.2% (Exhibits 26, 27, R. 471, 472.) The Association had about 50 members on November 26, 1973, the time of trial (Tr. 82). Some months prior to the trial the total number of Chicano officers was approximately 70 (Trial Court's finding

number 23). Consequently, Chicanos comprised approximately 21 per cent of the commissioned officer population, which is slightly more than half of their numbers in the relevant population base. Nearly two thirds of all Chicano commissioned officers were members of the Association. The invalidation of the challenged entry level procedures would indicate a "substantial" probability of almost certainly increasing the number of Chicanos in the Association. Conversely, maintenance of the challenged entry level procedures would operate to the detriment of the Association by maintaining their numbers at the same or a reduced level. Thus the "substantial probability" that was found lacking in Warth, is patent in the present case; and thus comports with the mandate of that case as injury to the Association is directly traceable to Petitioners' exclusionary policies. Additionally, it is clear that the requisite causal link between Petitioners' exclusionary policies herein and the underrepresentation of Chicanos on the force, which both Trial and Appellate courts found, has been established.

Particularly relevant is the testimony of

Ms. Helen Lopez, an associate member of the Association. S e applied for a sworn personnel position but fa led to meet the height standard for female officers of the Department (R., Vol. VII; 524-26). Although Ms. Lopez is not an individually named party to this action, the Association represents her prospective employment interests and those of other members applying for sworn officer positions in the Department. The Court of Appeals correctly determined that there was an adequate showing of a personal stake by the Association and individuals to challenge the hiring policies of the Department under Warth. Petitioners seek to limit a challenge to an employers tests to those persons examined in each examination. This is obviously a waste of judicial resources to require additional suits by applicants. Respondents believe that an action raising the employment issues addressed herein most efficiently and properly provides the opportunity for the vindication of the rights involved.

In addition to the stated objectives of

the Association, there were efforts by the Association to change the hiring practices of the Department (Exhibit 17, R. 101). These efforts form the basis for a live, concrete dispute essential to justiciability found lacking in the claims of housing contractors association in Warth.

B. The Court of Appeals Correctly Ruled that Respondents' Standing to Sue Is Not Barred by the Doctrine of Jus Tertii Which Determination Does Not Conflict With Any Ruling of This Court Nor of Any Other Circuit Court.

Petitioners assert That Respondents' argument is identical to the one presented by Metro-Act in Warth. Although Petitioners correctly state that Respondents complain of acts which deprive them of racially integrated police force, Respondents also claim that the acts also deprive them of their right to associate. The right to associate applies to the benefit of the members of the Association and also to the Association itself. The named Plaintiffs and the Association by asserting this right are asserting their right to associate and not those of third parties, and there is thus no genuine jus tertii claim.

Only where the Association is asserting the substantive protections of its members is the assertion one of jus tertii. Assuming arguendo, that Respondents herein were not claiming constitutional violations of their rights but those of third parties, the Association would still have jus tertii standing as they stand in a professional relationship which is adversely affected by the actions of Petitioners which deal with the subject matter of that relationship. Thus in Brewer v. Hoxie School District 238 F.2d 91 (8th Cir. 1956) it was held that a school board had standing to sue under the Civil Rights Act, to enjoin Defendants from interfering with the operations of the schools on a desegregated basis. The school board there claimed that such interference deprived admitted Negros of equal protection, since the interference was calculated to force the board to rescind its desegregation order. Apparently, the interference by the defendants did not violate any consitutional rights of the board, but the board was adversely affected by it, since it could not carry on its work. Brewer comports with the decisions rendered by this court. NAACP v. Button 371 U.S. 415 (1963); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Can it be said that the Associa-

tion, assuming, no direct violation of its rights, can carry on its efforts unaffected by Petitioners exclusionary policies? The answer must be no. The denial of standing to the Association in this context must affect it directly; since its general inability to carry on its purpose would discourage prospective numbers from joining and prompt those who are already members to withdraw from its membership. It is clear that the Association has standing in its own right.

Nor is the Respondents' position herein a departure from established jus tertii doctrine. In Barrows v. Jackson, supra, a covenantor of a restrictive covenant brought suit against a white covenantor who sold, in violation of the covenant, to a Negro. This court held that the white covenantor was the proper person to assert the rights of the vendee despite the latter's absence. A very determinative factor in allowing the assertion of the absentee Negro vendee's rights by the white vendor was the inability or impracticability of the Negro whose rights were asserted to protect those rights themselves. The victims of the possible discrimination would not be known (the court referred to them as "unidentified but identi-

fiable" - persons who might want to purchase a house, but could not do so because of racial restrictive covenants) and it would be difficult to prove that the vendor's decision not to sell was due to his fear of being subjected to a damage action. Moreover, there would be no way, even under broad intervention rules, that a Negro could become a party to any proceeding to protest that the awarding of damages to a vendee would impair his right to purchase property in the future.

Many of the considerations weighing in favor of the vendor in Barrows weigh in favor of the individual named Petitioners and the Association here. There exists a general inability and impracticality by unsuccessful entrance level examinees, whose rights it is claimed are being asserted, to protect those rights themselves. The examinees know that they were rejected on the basis of a written examination. It is generally assumed by examinees that an examination effectively measures one's ability for a position. The affected examinees would quite likely assume that they were unsuited for the position because they had failed the examination. The general inability of Chicano entry level

examinees to challenge the testing proceedings is exacerbated by the fact that under § 2000-5(e) of Title VII all of those Chicanos whose names appear on Plaintiffs Exhibit 2 would have lost their claims on the three hundred first day after their rejections. The only Plaintiffs then capable of vindicating these rights would be Respondents herein (R. Vol. 5, Plaintiffs Exhibit 2). Moreover, the results on the examination are highly fragmentized which makes it greatly more difficult to discern a pattern or practice of recurrment rejection of a given group. On examinations given over several years, only those with the ability to observe the results on those examinations over a period of years can effectively discern constitutional violations. The Respondents herein would be in the best position, if not the only position, to know the victims of the discrimination. Moreover, absent an association and individual members, such as the Chicano Police Officers Association and the individual Respondents herein, whose avowed objective is equality in hiring, it is unlikely that an unsuccessful examinee would challenge a prospective employers hiring practices. The spectre of the employer's

reprisal for such a challenge would weigh heavily against such a challenge. The only effective challenge to the Department's hiring practices has been by the Association.

As stated, the Warth court alluded to the jus tertii claims of Rochester taxpayers and dismissed them (95 S. Ct. at 2210-11) asserting that the actions by the Rochester taxpayers were not essential to the employment by poor non-residents of their constitutional rights. This court opined that the tax rates of Rochester residents was in effect, and not a cause, of the exclusion of the poor from Pennfield.

In general in those cases permitting assertion of jus tertii the court has found the presence of at least one of three factors; the presence of some substantial relationships between the claimant and the third party whose rights the claimant seeks to invoke, Eisenstadt v. Baird, 405 U.S. 438, 445 (1972); Griswold v. Connecticut 381 U.S. 479, 481 (1965); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458-59 (1958); the unpracticality of the right holder asserting their own constitutional rights; Eisenstadt v. Baird, supra, NAACP v.

Alabama, supra, and Bantam Books Inc. v. Sullivan 372 U.S. 58, 65-66 n. 6 (1963) (dictum); the need to avoid the dilution of the right-holder's constitutional rights which would result were the assertion of jus tertii not permitted. Eisnestadt v. Baird, supra, Griswold v. Connecticut, supra, Barrows v. Jackson, supra, at 257, and the need to protect fundamental rights, which would be denied if the assertion of jus tertii were not permitted. Barrows v. Jackson, supra at 257.

Respondents submit, their action falls within the mandate of Warth and its predecessors relative to any jus tertii claims by them.

Assuming that the Respondents assert a genuine jus tertii claim, would the denial of such assertion deprive the right holders of a fundamental right? Respondents respectfully submit the right holders in this case would be deprived of a fundamental right which denied would concommitantly blunt the anti-discrimination policy "that congress considered of the highest priority" Otis v. Crown Zellerbach Corp., 398 F. 2d 469, 499 (5th Cir. 1968).

II. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD TO FIND ERROR IN THE EXCLUSION OF EVIDENCE ON PRIOR EXAMINATIONS RESULTS IN ESTABLISHING A PRIMA FACIE CASE.

Contrary to what Petitioners represent, the holding of the Court of Appeals does not stand for the preposition that "even if the results of the challenged examinations showed no discriminatory impact, the aggregate results of totally different examinations given in the prior seven years should have been considered." (Petition for Writ of Certiorari at 17.)

First, the Court of Appeals held that the June 2, 1973 examination had an adverse effect and was not too small to be evaluated as a statistically significant impact on Chicanos. Second, that evidence of disparate pass rates between the Chicanos and Anglos on prior promotional examinations was clearly within a reasonable time frame and should not have been rejected as irrelevant in considering the June 2, 1973 examination. That holding is consistent with holdings by this court and other circuit courts of appeals.

A. The Court of Appeals Ruled That Petitioners Are Bound By And to Their Objection to The Proffered Evidence to The Stated Grounds of Relevancy.

As a preface to any discussion of the case law relating to the question herein, Respondents would respectfully point out to this court that the issue of errors in computation relative to prior promotional examinations was not properly before the district court or the Court of Appeals. It is not before this court, nor has it been before any other court, since no errors in computation were shown. On cross examination minimal errors at most were shown by Petitioners to the following exhibits: Exhibit #3 (R. Vol. VI 108), a summary of classes that have passed through the Albuquerque Police Academy which included classes 31-40. The only classes on which the witness Ray Chavez was cross-examined were classes number 31 (R.Vol.,VI 109-111), number 33 (R. Vol., VI 110), number 34 (R. Vol., VI, 111), number 39 (R. Vol. VI, 111), and number 40 (R. Vol. VI, 113). The witness was further cross-examined, relative to computational errors, on exhibit number 4, Compilation Summary of Police Aides hired under LEAA Grant, (R. Vol.VI, 116), and

exhibit number 5, Incentives Pay Award Summary, (R. Vol. VI, 120). None of the foregoing in any way relate to or involve prior promotional examinations. The witness was cross-examined on exhibits numbers 8 (R. Vol. VI, 130), 11 (R. Vol. VI, 132), and 12 (R. Vol. VI, 132), but that examination never questioned computation errors but merely involved the interrogation of the witness relative to what other factors entered into the determination of whether a person's name would be placed on the promotional list (see e.g. R. Vol. VI, 132). Additionally, there was no voir dire of the witness upon introduction of the exhibits relating to prior promotional examinations which were composed of six exhibits. The witness was cross-examined only on the above-mentioned three of the six. Consequently, since no errors in computation on prior promotional examinations were shown, either by way of voir dire or on cross-examination, there was no ground for rejecting those exhibits on that basis and it could not possibly constitute a matter properly before this or any other court.

Moreover, even if there were proper grounds to raise the foregoing issue, Petitioners misapply the law which this court has promulgated on the subject. Petitioners cite Hamaling v. United States, 418 U.S. 187 (1974) and Kansas City Southern Railway Co. v. Jones, 241 U.S. 181 (1916) in support of their claims. Neither of these cases stand for the proposition which they propose. Respondents would apply the case of McCandless v. United States 298 U.S. 342, 80 L. Ed. 1205, 56 S. Ct. 764 (1936) as standing for the proposition that where evidence has been objected to as inadmissable for certain specific reasons, the objection will be deemed to be limited to the grounds which have been specified (". . . no objection was made. . . such as is now urged" 298 U.S. 342 at 346).

B. The Ruling of the Court of Appeals That Prior Examination Results Were Relevant Corroborative Evidence of An Adverse Impact was Correct, Does Not Conflict With Any Ruling of This Court or of Any Other Circuit Court and Does Not Present Any Important Federal Question.

Moreover, the Court of Appeals correctly ruled that evidence of prior promotional

examinations was relevant. See Note, An American Dilemma - Proof of Discrimination 17 U. Chicago L. Rev. 107 (1949). Schmeller v. United States, 143 F. 2d 544 (6th Cir. 1944); United States v. Feldman, 136 F. 2d 394 (2nd Cir. 1943).

C. The Holding of the Court of Appeals Relative to Statistical Significance Was Correct and Does Not Conflict With the Holdings of This Court, Any Decision of Any Other Circuit And Raises No Important Federal Question.

Petitioners assert that the district court's holding on the instability of the pass-fail ratio is supported by the testimony of Dr. Fredrick Carlton (R. Vol. X, 770-78). It is submitted that Petitioners argument is misplaced as the testimony of Dr. Carlton does not address the question. Dr. Carlton's testimony related solely to the question of whether the test results evinced a disparate impact on Chicano examinees. He concluded that, relative to their numbers on the force, Chicanos examinees were not the subject of a disparate impact. The only evidence on the sufficiency of the numbers in the test sample was given by Dr. Norman, Respondents expert (R. Vol. VIII 676). Dr. Norman concluded that for purposes

of proper analysis the numbers involved sufficed. Consequently, the district court's holding that the pass-fail ratio was unstable was unsupported by any evidence in the record. Indeed, the only evidence on the matter was supportive of the holding of the Court of Appeals. The holding of the Court of Appeals comports completely with the holding of this court in Griggs v. Duke Power Co., 401 U.S. 424 (1971).

CONCLUSION

Because the decision of the Court of Appeals does not conflict with any holding of this court or any other circuit courts and does not present any important federal question not already decided by this court, a Writ of Certiorari reviewing the decision and opinion of the Court of Appeals should not issue.

Respectfully submitted,

VILMA S. MARTINEZ
JOEL G. CONTRERAS
RAY M. VARGAS
Mexican American Legal
Defense & Educational Fund
145 Ninth Street
San Francisco, California 94103

Counsel for Respondents

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